MALPRACTICE LIABILITY

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MEDICAL MALPRACTICE

by Gordon D. Laws

I. Introduction

A. In 2003 the Texas Legislature passed massive changes in medical malpractice law to protect physicians from frivolous law suites and to lower medical malpractice insurance rates.

B. These changes are embodied in chapter 74 of the Texas Civil Practice and Remedies Code, and they replace the Medical Liability and Insurance Improvement Act found in Texas Civil Statutes, article 4590i.

C. This paper will summarize the most significant of these changes and summarize the most common theories of medical malpractice liability.

II. Scope of the Act

A. The scope of chapter 74 is much broader than article 4590i.

B. Under the old act, a health care provider was a "person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the state of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home, or an officer, employee, or agent thereof acting in the course and scope of his employment." Art. 4590i, sec. 1.03.

C. A health care liability claim was a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract.

D. Under new chapter 74, a health care provider means any "person, partnership, professional association, corporation, facility, or institution

duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including: a registered nurse, a dentist, a podiatrist, a pharmacist, a chiropractor, an optometrist, or a health care institution." *Tex. Civ. Prac. & Rem. Code*, sec. 74.001(12). The terms also includes an officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician, and an employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship.

E. Health care institution under chapter 74 includes an ambulatory surgical center, an assisted living facility licensed under chapter 247 of the Health and Safety Code, an emergency medical services provider, a health services district created under chapter 287 of the Health & Safety Code, a home and community support services agency, a hospice, a hospital, a hospital system, an intermediate care facility for the mentally retarded or a home and community-based services waiver program for persons with mental retardation adopted in accordance with section 1915(c) of the federal Social Security Act, a nursing home, or an end stage renal disease facility.

F. A health care liability claim means a cause of action against a health care provider or a physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

G. The act applies to affiliates, employees, independent contractors, and administrative personnel, affiliates, shareholders, directors and managers.

H. It also applies to administrative activity related directly to health care, which is defined in the statute.

III. Prerequisites for Filing Suit

A. A claimant filing suit on a health care liability claim must give written notice of the claim 60 days before filing suit to each health care provider and physician against whom suit is to be filed by certified mail, return receipt requested.

B. The notice must include a signed release of or authorization for the release of medical records and medical information relating to the examination, care, or treatment which is the subject of the health care liability claim. The authorization must be in the form specified in the statute.

C. All parties are entitled to obtain from all other parties, within 45 days of receipt of written request for such records, complete and unaltered copies of the patient's medical records.

D. The claimant fulfills his or her responsibility for providing records by providing the required medical release.

E. The statute of limitations is tolled for 75 days as to all physicians and health care providers after the giving of the required notice.

F. In the complaint or petition, the plaintiff shall plead that the required notice has been given and shall provide any evidence required by the judge of the court that such notice was given.

G. The medical authorization must meet following requirements.

1. It must authorize the physician or health care provider against whom the health care liability claim is asserted to obtain specified health care information regarding claimant for the following purposes:
    a. Investigation of the claim about which notice has been given.
    b. Defense of any suit arising out of such claim.
2. The information to be obtained includes both oral and written information. (This means that the health care provider or physician may talk to other physicians and health care providers who have provided care to plaintiff.)
3. The release authorizes the physician or health care provider to obtain health information regarding the claimant from any other health care provider or physician who has treated the illness or injury associated with the alleged claim, and the claimant must list those physicians or health care providers in the release. The release or authorization must authorize all physicians or health care providers who provide care in the future for the illness or injury associated with the health care claim to provide relevant health care information to the physician or health care provider against whom a claim has been asserted.
4. The release must also authorize the release of health care information from any physician or health care provider who has examined or treated the patient within the five years preceding the incidents giving rise to the health care liability claims.
5. The claimant may also list all physicians or health care provides who have examined or treated the claimant from whom information may

not be obtained, because the claimant claims that such examination or treatment is unrelated to the health care claim being asserted.

6. The information obtained through the release provided by the claimant may be shared by the health care provider and/or physician against whom the claim is being made with the following persons:
    a. Any physician or health care provider who is now treating the claimant;
    b. Any liability insurance company providing liability insurance coverage or defense for any health care provider or physician;
    c. Any attorney, including secretaries and legal assistants of such attorney, who are employed by or on behalf of the physician or health care provider against whom a claim has been asserted;
    d. Any consulting or testifying experts employed by or on behalf of the physician or health care provider to whom the notice of claim was given; and
    e. Any trier of the law or facts relating to the suit filed seeking damages arising out of the medical care or treatment of the claimant.
7. The authorization shall expire upon resolution of the claim asserted or at the conclusion of any litigation instituted in connection with the subject matter of the notice of health claim accompanying the authorization.
8. The claimant has the right to withdraw or modify the authorization in writing at any time.

9. The consequences of such withdrawal or authorization are those specified in section 74.052 of the Texas Civil Practice and Remedies Code.

H. Section 74.052 provides that failure to give the required notice with the accompanying release or authorization shall result in the abatement of the suit or action until 60 days after the notice and authorization are provided.

I. If the authorization is revoked or modified at any time during litigation, the physician or health care provider against whom the claim is asserted may obtain an abatement of the suit or action until 60 days after the authorization is restored.

J. The form of the authorization is specified in section 74.052, and is in compliance with federal privacy rules under the Health Insurance Portability and Accountability Act ["HIPAA"].

IV. Preliminary Expert Witness Reports.

A. Article 4590i required the plaintiff to post a bond in the amount of $5,000, within 90 days of filing suit, for each health care provider or physician against whom a health care liability claim was asserted.

1. The purpose of the bond was to pay Defendant's costs if Plaintiff failed to provide an expert report.

2. The bond is no longer required under Chapter 74.

B. Section 74.351 governs the requirement that claimants or plaintiffs provide preliminary expert reports regarding each physician or health care provider specifying how each deviated from the standard of care and how such deviation caused claimant's or plaintiff's harm.

C. Plaintiff must serve one or more expert reports, with a curriculum vitae from each expert, for each physician or health care provider from whom

recovery is sought within 120 days after the claim is filed. The period for filing the expert report or reports may be extended by agreement of the affected parties.

D. Each physician or health care provider implicated in any such report must file any objections to the sufficiency of the report no later than 21 days after the report was served. If such objections are not filed within the specified time, the objections to the report(s) are waived.

E. If a claimant fails to file a timely report or reports within the time specified, the Court, upon motion of the affected physician or health care provider, shall enter an order awarding to the affected health care provider or physician reasonable attorneys fees and costs of court incurred by the health care provider or physician and shall dismiss the action against such physician or health care provider with prejudice. Dismissal with prejudice means that the claim may not be reasserted at any time.

F. If an expert report has been served, but found to be deficient, the court may grant one 30 day extension to the claimant in order to cure the deficiency. If the claimant does not receive notice of the deficiency until after the 120 day deadline for filing expert reports has passed, the 30 days shall run from the time the claimant receives the notice.

G. The expert report requirement may be fulfilled by more than one report from more than one expert dealing with different subjects required to be covered by the expert report or reports.

H. The expert reports need deal only with liability and causation, not the amount of damages.

I. The preliminary expert reports required

    1. are not admissible in evidence by any party;

2. shall not be used in a deposition, trial, or other proceeding, and

3. shall not be referred to by any party during the course of the action for any purpose.

4. If, however, the claimant uses an expert report required by section 74.351 for any purpose other than meeting the requirements of section 74.351, then these restrictions do not apply.

J. The preliminary expert report is required so that the court can determine whether there is a basis for going forward with the claim.

1. The above restrictions on the use of such reports apply, because the reports must be provided at the beginning of the litigation before much discovery has been conducted.

2. If the claimant uses the report for any other purpose than fulfilling the preliminary report requirement, the restrictions listed no longer apply.

3. Until the preliminary report requirement has been met, no discovery is allowed, except written discovery, such as requests for disclosure, written interrogatories, requests for inspection of and production of documents and tangible things, requests for entry onto property, and requests for admissions, depositions upon written questions, and discovery from nonparties.

K. "'Expert report' means a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm or damages claimed." *Tex. Civ. Prac. & Rem. Code*, sec. 74.351(r)(6).

1. The appellate courts have strictly construed the requirements of the preliminary expert reports and have affirmed the dismissal of cases in which the expert reports provided did not sufficiently specify the applicable standard of care, how the physician's or health care provider's care deviated from the standard of care and how such deviation caused plaintiff's injury, illness or harm.
2. Conclusory reports, merely stating in conclusory terms that defendant's conduct deviated from the standard of care and proximately caused plaintiff's harm have repeatedly been held to be insufficient.
3. One of the problems under prior law, however, is that an order denying a physician's motion to dismiss the case due to plaintiff having provided an inadequate expert report was considered interlocutory, or non-final, and could be not appealed.
    a. All of the appellate court opinions came from cases in which the trial court had dismissed plaintiff's case for failure to provide an adequate expert report.
    b. Cases in which the court either failed to rule or denied the physician's motion to dismiss due to the inadequacy of the reports were unappealable.
4. One of the changes made in 2003 was that the Court's order denying a motion to dismiss due to plaintiff's failure to provide a sufficient expert report may be appealed. *Tex. Civ. Prac. & Rem. Code, sec.* 51.014(a)(9).

5. The case may proceed with full discovery during the appeal, but trial is stayed pending the outcome of the appeal. *Tex. Civ. Prac. & Rem. Code,* sec. 51.014(b).

V. Qualifications Required of Expert Witnesses

A. The statute imposes certain requirements which experts testifying or providing preliminary reports in health care liability claims must meet. *Tex. Civ. Prac. & Rem. Code*, Sec. 74.351(r)(5); 74.401; 74.402.

B. In a health care liability claim against a physician, a person may qualify as an expert witness on the issue of whether the physician deviated from the standard of care only if the person is a physician who

1. Is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;
2. Has knowledge of the accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and
3. Is qualified on the basis of training or experience to offer an expert opinion regarding accepted standards of care.
4. Practicing medicine or medical practice includes, but is not limited to, training residents or students at an accredited school of medicine or osteopathy or serving as a consulting physician to other physicians who provide direct patient care upon the request of those physicians.
5. In determining whether a person is qualified on the basis of training or experience, the court must consider whether, at the time the claim arose or at the time the testimony is given, the witness

a. Is board certified or has other substantial training or experience in an area of medical practice relevant to the claim; and

b. Is actively practicing medicine in rendering medical care services relevant to the claim.

6. The court may deviate from the above standards in determining whether a physician is qualified to render expert opinions, if the Court finds that there is a good reason to do so, but must state on the record the reasons for departing from these criteria.

7. A party must object that an expert proffered by the opposing party is not qualified within 21 days of receiving a copy of the witness's curriculum vitae or within 21 days of receiving the witness's deposition. After these deadlines, a party may still object to an expert witness's qualifications, if circumstances arise after the deadline for objecting which the party could not anticipate earlier and which the party reasonably believes provide a basis for objecting to the expert. The Court shall conduct a hearing on the objection prior to trial, if possible. If a hearing on the objection cannot be held prior to trial, the hearing must be held outside the presence of the jury.

8. These provisions do not prevent a defendant physician from testifying as an expert witness on his own behalf.

9. For purposes of Sections 74.401-74.403, regarding qualifications of expert witnesses, "physician" means a persons who is the following:

a. Licensed to practice medicine in one of more of the states of the United States; or

b. A graduate of a medical school accredited by the Liaison Committee on Medical Education or the American Osteopathic Association only if testifying as a defendant and that testimony relates to that defendant's standard of care, the alleged departure from that standard of care, or the causal relationship between the alleged departure from that standard of care and the injury, harm or damages claimed.

C. In a health care liability claim involving health care providers other than physicians, the requirements for expert testimony regarding departure from the standard of health care are similar, except that the expert must be a health care provider who meets the following criteria:

1. The person is practicing health care in a field of practice that involves the same type of care or treatment as that delivered by the defendant health care provider, if the defendant health care provider is an individual, at the time the testimony is given or was practicing that type of health care at the time the claim arose;
2. The person has knowledge of the accepted standards of care for health care practiced by health care providers for the diagnosis, care or treatment of the illness, injury or condition involved in the claim; and
3. The person is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of care.
4. "Practicing health care" includes training health care providers in the same field as defendant health care provider at an accredited educational institution or serving as a consulting health care provider

and being licensed, certified, or registered in the same field as the defendant health care provider.

5. The other provisions regarding expert testimony regarding whether health care providers have deviated from the standard of care are similar to those relating to physicians and the deadlines for objecting to such expert testimony are the same.

D. The following are the requirements for expert witnesses testifying regarding causation in a health care liability claim.

1. A physician who is qualified to render opinions on causation under the Texas Rules of Evidence may testify about causation in any health care liability claim involving a physician or health care provider.

2. In a health care liability claim regarding dentistry, a physician or a dentist otherwise qualified to render opinions on causation under the Texas Rules of Evidence may testify.

3. In a case involving a podiatrist, either a podiatrist or physician who is qualified to render an opinion on causation under the Texas Rules of Evidence may testify.

4. A party may object to the qualifications of an expert to render opinions on causation under the same rules as apply to objecting to the qualifications of an expert to testify regarding the standard of care.

E. The expert testimony must also meet the test for reliability set forth in *DuPont v. Robinson*. In determining whether proffered medical evidence is reliable, the court must consider the following factors:

(1) The extent to which the theory can be or has been tested;

(2) The extent to which the technique relies upon the subjective interpretation of the expert;

(3) Whether the theory has been subjected to peer review and/or publication;

(4) The technique's potential rate of error;

(5) Whether the underlying theory or technique has been generally accepted as valid in the relevant scientific community; and

(6) The non-judicial uses which have been made of the theory or technique. *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549,557 (Tex. 1995).

VI. Damage Limitations

A. Chapter 74 specified several new limitations on damages and continued in effect, with modifications, the damage limitations which had survived constitutional challenge under Article 4590i.

B. New Damage Limitations for Non Death Claims

1. For health care liability claims, not involving the death of the patient, against physicians and/or individual health care providers (health care providers who are not institutions), non-economic damages, including exemplary damages, are capped at $250,000 per claimant, regardless of the number of physicians and/or health care providers and regardless of the number of causes of action asserted.

2. This limit is inclusive of all agents, employees, or anyone else for whom the physician or health care provider may be vicariously liable.

3. Each claimant includes not only the patient, but anyone else claiming damages due to injury to the patient, such as loss of consortium claims for spouses, or decedent's estates.

4. For health care liability claims, not involving the death of the patient, against one or more health care institutions, the non-economic damage cap is $250,000 per health care institution found liable, inclusive of all persons or entities for which vicarious liability may apply, except that in no case shall non-economic damages exceed $500,000, regardless of the number of health care institutions found liable and regardless of the number of causes of action asserted.

    a. The specification that the cap applies not only to the institution, but to all of those for whom vicarious liability may

attach is to prevent circumventing the cap by suing employees of the institution, for whose negligence the institution could be found liable.

b. The definition of "health care provider" includes an employee, independent contractor, or agent of a health care provider or physician and others for whose negligence a health care provider or physician may be held liable.

c. The purpose of this limitation is to prevent the limitation from being circumvented by suing not only the hospital, for example, but every nurse, aide, administrator, or other employee of the hospital, for whose negligence the hospital could be found liable,.

5. These damage limitations do not relate to death cases and are not subject to cost of living adjustments.

6. There are other limits which apply to charitable institutions and governmental entities, which are not discussed in this paper.

C. New Damage Limits for Death Cases.

1. The damage limitations under Article 4590i still apply to death cases, except that there are modifications in the new act.

2. For wrongful death and survival action cases, all damages, including exemplary damages, shall be limited to $500,000, regardless of the number of defendants and regardless of the number of causes of action asserted.

3. This limitation does not apply to past and future medical expenses, but does include past and future lost earnings. Post and future lost

earnings are economic damages and are not capped in non-death cases.

4. The damage limitation in death cases is subject to cost of living adjustments from August 29, 1977.

5. The current limit is approximately $1.4 million, due to cost of living adjustments since 1977.

D. The damage limitation specified for death cases was originally set out in Article 4590i for all health care liability claims, but, for common law causes of action, was declared unconstitutional under the Open Courts provision of the Texas Constitution.

E. Wrongful death and Survival Act cases are not common law causes of action, but creations of the legislature. Therefore, the Courts held that the legislature had Constitutional authority to limit causes of action it had created.

F. Under Court interpretation, however, these limits applied per defendant, and a claimant, by recovering against several physicians or health care providers could recover several times the limit specified. The new act has changed the court interpretation of Article 4590i by specifying one damage cap, regardless of the number of defendants, rather than applying a separate damage cap for each defendant.

G. Further, the damage cap under Article 4590i did not include exemplary damages, but exemplary damages are included within the caps in Chapter 74.

VII. Effectiveness of Caps

A. Some physicians in Texas have experienced lowered malpractice premiums since the passage of the damage caps and Constitutional amendment which ensured their enforcement and others have not.

B. There is also reason to question how effective non-economic damage caps really are in reducing medical malpractice verdicts.

C. In the short run, they seem to have been very effective in reducing the number of law suits, although many lawyers are keeping records of cases they claim can no longer be brought due to the damage caps in order to approach the legislature about amending the law and increasing or eliminating the caps.

D. It is not certain, however, how effective the caps may be in the long run, if they are left in place by the legislature.

E. For example, physical disability is considered a non-economic element of damages for which the new caps will apply.

F. A plaintiff lawyer may circumvent the damage cap by converting this non-economic element of recovery into economic damages by putting a price tag on the services the disabled person once performed, but can no longer perform due to the disability.

G. This may be accomplished by listing the services the disabled or deceased spouse once performed and presenting evidence of what it would cost to hire others to perform these services.

H. For example, plaintiff's counsel may present evidence of how much it costs to hire someone else to care for the yard, to perform home repairs, to perform car repairs, to tutor the children, and to perform a number of other services a disabled person once performed, but can no longer perform.

I. This type of analysis was used extensively in wrongful death cases several years ago, because, until 1983, the Texas courts interpreted the Wrongful Death Statute as allowing recovery of only economic losses caused by the death of a family member. Damages for loss of companionship, society, mental anquish, and the like were not recoverable. But family members could recover for the loss of services once performed by the deceased person, such as household chores, repairs, tutoring of children, and counseling children and spouse.

J. The distinction between economic and non-economic damages is not such a distinct bright line as might at first be imagined. In many cases, elements of non-economic damages can be recast as economic damages.

VIII. No Liability Without Physician Patient Relationship.

A. There is no medical malpractice liability without a physician patient relationship.

B. The existence of a physician patient relationship is a matter of contract, either express or implied.

C. There is no duty to treat a distressed person who is not a patient.

D. Even an on call doctor in a Hospital emergency room ("ER") has no duty to treat an individual who goes to the ER, unless the doctor's contract with the hospital requires it. In this case, the physician was a pure volunteer, not required to be on call for his staff privileges.

E. A physician was under no liability for failing to tell the patient of test results when the lab tests were run at the request of Texas Rehabilitation Commission. The patient did not select the doctor, did not come for treatment, and did not ask to be informed of the test results. Therefore, there was no physician patient relationship.

F. A physician was under no duty to inform the parent of a patient whom he was treating for sexual abuse. The Court held that there was no physician patient relationship between the doctor and the parent. Accordingly, there was no duty to inform the parent of the sexual abuse.

G. Problems may arise when a physician is hired by a company to perform physicals on employees. In one case, the plaintiff received a promotion. He was required to take a physical before the promotion became effective. The employer hired a physician to perform the physical. The physician reported to the employer that the employee was in very poor health. Due to the physician's report, the employee not only did not get the promotion, but he was terminated by the employer. The employee sued the physician, alleging that the evaluation was negligently performed and that he had none of the health problems the physician had reported. The Court held that the physician could be liable, despite the absence of a physician patient relationship, because the physician had a duty to exercise reasonable care to avoid doing any harm to the person he examined.

H. The physician may terminate the physician patient relationship at any time, but must do so in a manner which will give sufficient time to allow the patient to get alternative medical care, if continuing care is necessary.

IX. Duty to Warn or Provide Instructions.

A. In certain cases the courts have imposed duties upon physicians to give warnings to patients for either the patient's benefit or the benefit of some third party, when the existence of a physician patient relationship was tenuous at best.

B. For Patient's Benefit

1. A physician who is not the primary doctor, such as a radiologist, still has a duty to disclose the patient's condition to the patient.
2. A radiologist had a duty to warn the patient that he had a broken arm, which the ER doctor had failed to diagnose the previous day.
3. A doctor assisting another doctor in performing a procedure has a duty to warn the other doctor if the procedure is being improperly performed.
4. A pregnant woman has the right to know she has previously had rubella, because that may affect the health of her infant.

C. For the Benefit of Third Parties.

1. A physician must warn a patient not to drive when the physician has prescribed a sedative, which may affect the patient's ability to drive. Failure to provide the warning may result in the physician being held liable to a third party injured by the patient driving while impaired.
2. The physician's duty in regard to a patient for whom the physician has prescribed a sedative ends with warning the patient not to drive. The physician has no duty to prevent the patient from driving, if the patient decides to do so despite the warning.
3. A physician did not need to warn a patient not to drive, where patient has ingested cocaine on his own. The distinction is that in the first instance the treatment rendered by the doctor created the dangerous condition, while in the second instance the dangerous condition was created by patient, himself.
4. It would be wise to warn the patient in both instances.

5. No duty existed to a driver injured when a mental patient, not known to be harmful to himself or others, threw himself in front of plaintiff's car.

6. In another case, plaintiffs sued four doctors for failure to warn an epileptic patient not to drive due to potential seizures. Plaintiffs' family member was killed when the patient suffered a seizure while driving. Plaintiffs alleged that the four doctors owed a duty to plaintiffs to warn their epileptic patient not to drive. The Texas Supreme Court held that none of the physicians owed a duty to plaintiffs to warn an epileptic patient not to drive due to the potential for seizures. The Court noted that the patient had the ultimate duty to determine whether he could safely drive or not. The patient also knew that he could have a seizure while driving.

7. The Texas Supreme Court has held that mental health care professionals owe no duty to warn identifiable third parties of danger posed by a psychiatric patient.

    a. In *Tarasoff v. Regents of University of California,* 17 Cal.3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976), the California Supreme Court held that a psychotherapist could be held liable for failing to exercise reasonable care to protect an identifiable victim of a mental patient who poses a serious threat of violence to another. Reasonable care may include warning the ascertainable victim or other measures. Several Texas Courts of Appeal had followed the *Tarasoff* decision, finding that such a duty exists in Texas, and others had not.

b. In *Thapar v. Zelzulka*, 994 S.W.2d 635 (Tex. 1999), a mental patient killed his stepfather within a month of telling his psychiatrist he intended to so. The Texas Supreme Court held that the psychiatrist had no duty to warn the stepfather of this threat and declined to adopt the *Tarasoff* rule in Texas.

c. This ruling was based upon a state statute requiring mental health professionals to keep communications from patients confidential.

d. The statute allows the mental health professionals to notify law enforcement personnel if there is a probability of imminent harm to the patient or others. The Texas Supreme Court held that there is no legal duty to the third party to provide information to law enforcement, because the statute does not require it, but simply permits the mental health care professional to communicate with the police.

e. The statute requiring confidentiality was passed after the *Tarasoff* case was decided by the California Supreme Court, and the Texas Supreme Court reasoned that the legistlature was aware of the *Tarasoff* decision. Accordingly, the Court reasoned, the legislature had rejected the *Tafasoff* decision by passing a statute prohibiting disclosure of communications between mental patients and their therapists.

f. The Supreme Court also based its decision, in part, upon the lack of a physician-patient relationship between the psychiatrist and the wife of the deceased step-father. In the absence of a physician-patient relationship, the Court

reasoned that the psychiatrist owed no duty to the step-father's wife.

8. The Ethical Opinion by the Texas Medical Association Board of Councilors under "Physician Notification," provides that "[w]hen a patient threatens to inflict serious bodily harm to another person or to himself or herself, and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for protection of the intended victim, including notification of law enforcement authorities."
    a. Based upon the *Thapar* case, there is no civil liability for failing to warn the victim or law enforcement.
    b. In complying with this ethical opinion, a physician probably should not warn the intended victim, because that would probably violate the confidentiality provisions of the Medical Practices Act.
    c. A physician is free to notify law enforcement personnel or other medical personnel if he or she determines "that there is a probability of (A) imminent physical injury to the patient, the physician, or another person; or (B) immediate mental or emotional injury to the patient." *Tex. Occ. Code*, §159.004(2); *c.f., Tex. Health & Safety Code*, § 611.004(a)(2).
9. In another case, the physician had a duty to warn a patient not to drive when the physician prescribed Quaaludes for the patient.
10. The Supreme Court also held that there is no duty to notify the wife of a patient diagnosed with HIV, even though the wife was clearly an ascertainable person at risk. The physician should attempt to get the

patient to tell his spouse or get permission for the physician to tell the spouse.

11. Physicians have a duty to warn patients of possible side effects of any drugs they prescribe. Pharmaceutical companies must warn physicians of a drug's risks, but have no duty to warn the patient.

12. The physician has a duty to disclose known medical negligence to the patient. If a physician does not do so, the statute of limitations will be tolled.

13. The Courts have reached different conclusions on the duties owed by a doctor consulted by telephone. Some courts have held that a physician patient relationship does not exist when a physician is consulted by telephone by another doctor giving treatment to the patient. Other Courts have found the existence of a physician patient relationship between the doctor consulted by telephone and the patient.

    a. The different results are fact specific.

    b. It seems to turn on the amount of involvement of the consulted physician and whether he is part of a medical plan.

    c. The Texas Supreme Court found that there was no duty where the consulted physician simply advised the ER doctor that the patient should be sent to another hospital for treatment.

    d. Similarly, no duty existed where the consulted physician was in the same medical group as the treating physician and was giving his partner advice.

e. By contrast, liability existed where the patient joined a prepaid medical plan, went to a hospital ER, and the physician, who was the plan's preferred provider, gave telephonic advice to the ER doctor. The Court found that there was a physician patient relationship in that case. The contracts between the doctor and the medical plan and the medical plan and the patient were sufficient to establish a physician patient relationship with the preferred provider who offered advice to the ER physician caring for the patient.

14. A physician covering for his partner was not liable to a hospital patient of whom he was unaware until he discovered her while making rounds the following day. The court was reluctant to find a physician patient relationship where there had been no prior contact between the physician and the patient.

15. A physician may also be liable for the negligence of persons to whom he has delegated certain responsibilities. The Medical Practices Act provides that the physician may delegate certain responsibilities, including the administration of drugs, to non-physicians, so long as it is reasonably prudent to do so. The physician is legally responsible for the actions of the health care provider to whom he delegates responsibilities.

X. Liability of Physician for Acts of Hospital Personnel.

A. The Texas Supreme Court has rejected the "Captain of the Ship" doctrine, which held the operating surgeon vicariously liable for everything that happened in the operating room ("OR") on the grounds that he or she had complete control over everyone in the OR.

B. Now the question is whether the surgeon had the right to control other people in the operating room in the performance of their duties. If the surgeon had the right to control others in the OR, he or she may be held liable for the negligence of those other persons, even if the surgeon actually exercised no control.

C. If the surgeon, for example, has the right to control the performance of the nurses in the OR during surgery, the surgeon may be held liable for the negligence of the nurses, even though they are employed by the hospital.

XI. Liability of Physician for Other Physicians' Conduct.

A. A physician may be liable for the negligence of another physician if he or she was negligent in selecting the other physician for a referral. Similarly, a physician may also be liable for negligence in selecting a physician to cover patients. A physician should use reasonable care in selecting a physician to whom he or she is going to refer a patient.

B. A physician is liable for actions of his or her partners. A physician may be liable for the negligence of non-partners, if the physicians led patients to believe that they are partners.

C. When a specialist delegates surgery to a non-specialist, the specialist has the responsibility to make certain that the non-specialist is properly supervised.

D. A physician assisting another physician in the performance of surgery may be liable for the negligence of the chief surgeon in using an improper procedure, if the assistant fails to warn that the procedure is improper.

E. A physician may be liable for another doctor's negligence if the physician has the right to control the other doctor. It does not matter whether physician actually exercises control. The right of control is sufficient to impose liability.

XII. Impact of Managed Care Physicians' Duties to Patients.

A. The Texas Medical Association Board of Councilors has dealth directly with a physician's duties to a patient under managed care.

1. Physicians must always place the interests of the patient first, regardless of the form of the reimbursement system or the location the services are rendered.
2. Physicians should not be asked to participate in health care rationing decisions on an individual patient basis beyond the traditional cost/benefit judgments that are made as part of normal professional responsibilities.
3. Physicians should assist patients who wish to seek care outside of the managed care program if the physician thinks that is in the patient's best interest.
4. Physicians should promote full disclosure to patients in managed care plans, including disclosure of treatment alternatives not covered by the plan.
5. The TMA opposes gag clauses which prohibit a physician from communicating with a patient.
6. A physician should be a patient advocate in appealing denials of coverage for care the physician believes is medically necessary.
7. Patients should be made aware of the financial incentives that could affect the type and level of care the patient receives. This responsibility falls first upon the plan. Physicians must not be prohibited from discussing all circumstances that might affect the care their patients receive, whether it be treatment options available

through the patient’s plan, or the financial mechanisms under which the physician is compensated.

B. Patients must be informed of financial incentives which affect patient care.

C. Regardless of the kind of insurance plan a patient has, a physician’s duty is to render the appropriate medical care to his or her patient.

XIII. Theories of Recovery.

A. Negligence.

1. To establish a case for medical malpractice or medical negligence, the plaintiff must establish by an expert with knowledge of the relevant standard of care (1) that the diagnosis or treatment complained of was negligent and (2) that it was the proximate cause of plaintiff’s injuries.

2. To establish negligence, plaintiff must establish the standard of care and demonstrate that the physician deviated from the standard of care.

3. A physician deviates from the standard of care if he does or does not do what a reasonably prudent physician would or would not have done under the same or similar circumstances. It requires expert testimony to establish the standard of care and to demonstrate that the defendant has deviated from the standard of care.

a. There is a presumption that a physician has met the standard of care.

b. Plaintiff must rebut that presumption with expert testimony regarding the standard of care.

c. The requirements for expert testimony are discussed above.

6. Proper Medical Records Documentation.

   a. Proper medical record documentation is an essential part of rendering proper medical care. Proper medical records serve as a tool to remind the physician of the patient's prior medical problems and the care rendered. The records also provide a resource for other physicians who may need to be involved in the patient's care.

   b. Proper medical records should include all subjective complaints, your own observations of the patient, the details of the physical examination findings, the identity and results of any diagnostic tests or procedures, the diagnosis, and any treatment prescribed. Prescriptions made by telephone should also be recorded.

   c. The records should be legible and complete.

   d. Medical records must be kept confidential.

   e. The Texas legislature has passed confidentiality requirements as part of the Texas Medical Practices Act.

      1) A physician must keep confidential any communication between the physician and patient relative to or in connection with any professional services rendered by the physician to the patient.

      2) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed, except with

certain exceptions provided in the Medical Practices Act.

f. There are a number of exceptions to the confidentiality specified in the Medical Practices Act.

g. The U.S. Government has also imposed confidentiality requirements under Health Insurance Portability and Accountability Act. Those provisions are beyond the scope of this paper.

h. Proper medical records are essential to protecting yourself from medical malpractice liability.

1) First, proper medical documentation helps physicians avoid medical malpractice by reminding or informing treating physicians of what was previously done for this patient.

2) Proper medical records can prove that a physician administered the proper tests and rendered the proper treatment in the face of patient allegations that certain tests or treatments were not rendered.

3) Medical records can document that informed consent was obtained from the patient before performing any procedure.

B. Battery.

1. This is a technical battery and occurs when a procedure is performed on a person without his consent or the consent of someone who has the legal authority to give such consent, in the absence of emergency conditions.

2. Implied consent to treat exists if the patient is unable to give consent and his life is in danger.

3. Battery occurs if one procedure is authorized, but a different one is performed.

4. Battery is not a form of lack of informed consent.

C. Lack of Informed Consent.

1. The Medical Care Recovery Act (Art. 4590i) established the Texas Medical Disclosure Panel, and the Panel has been continued under Chapter 74. *Tex. Civ. Prac. & Rem. Code*, §§ 74.101, et seq.

2. The Panel was to evaluate all procedures and treatments and assign each to the disclosure list or the non-disclosure list. The non-disclosure list consists of those treatments and procedures for which the Panel has concluded that no disclosure of risks is necessary. The Panel was required to determine what risks are to be disclosed for every treatment or procedure on the disclosure list.

3. At least annually, the Panel is required to review new treatments and procedures, determine which ones require disclosure, and determine what risks are to be disclosed.

4. A physician who complies with the act, by disclosing or not disclosing in accordance with the lists, enjoys a rebuttable presumption that he or she was not negligent. This presumption shall be included in the charge to the jury.

5. A physician who violates the statute is subject to a rebuttable presumption that he or she was negligent. This presumption shall also be included in the charge to the jury. But a failure to disclose may be found not to be negligent if there was an emergency or if, for

some other reason, it was not medically possible to make the disclosure.

6. For procedures not on either list, physicians and health care providers are under the duty otherwise imposed by law to inform patients of the risks of the procedures.

7. Chapter 74 provides that in a medical malpractice case in which plaintiff alleges lack of informed consent, the only theory on which recovery may be obtained is failing to disclose risks and hazards that could have influenced a reasonable person in making a decision to give or withhold consent. Tex. Civ. Prac & Rem. Code, § 74.101.

8. Section 74.101 applies to treatments or procedures which are not on either list, and it changed the common law.

   a. The issue is no longer what warnings or disclosures are given by the reasonably prudent physician in the relevant medical community when performing the procedure, as it was at common law.

   b. It is unnecessary to present expert testimony to demonstrate what risks the reasonably prudent physician would have disclosed.

   c. If the procedure was not on either list, plaintiff must establish by expert testimony that the undisclosed risk was inherent in the treatment or procedure and that the risk is material in that it could have influenced a reasonable person in giving or withholding consent.

   d. In a disclosure case where the procedure or treatment is on the disclosure list, there is no need to prove by expert testimony

that a risk is material, because the panel has already decided that. Any risk which the Panel has listed for a treatment or procedure on the disclosure list is material.

9. Plaintiff is also required to prove that the physician's failure to properly warn plaintiff of the risks was the proximate cause of plaintiff's injuries. The jury must be specifically asked to find that the failure to give informed consent was the proximate cause of the injuries. The proximate cause issue must be framed objectively, rather than subjectively. In other words, the issue will be what a reasonable person would likely have done had the required disclosures been made, not what the Plaintiff would have done.

10. The informed consent should be documented in writing, signed by the patient, if possible, and signed by a witness. In procedures which are on the disclosure list, the informed consent form should list the risks as they have been set forth by the Panel.

11. For minors, a parent or legal guardian should be given the risks of the procedure and asked to sign the informed consent form.

12. For a person who is mentally incompetent, the person's legal guardian or someone with authority to sign for the patient should sign the informed consent form.

13. Consent is implied in emergencies when the patient's life is at stake, and neither the patient nor anyone authorized to act on his behalf can give informed consent.

D. Abandonment.

1. A cause of action for abandonment includes the following elements:

a. There must be a physician patient relationship;

b. There must be a unilateral severance of the relationship by the physician;

c. There must be a need for continuing medical treatment when the severance occurred;

d. The physician must fail to give reasonable advance notice to allow the patient to seek alternate care or fail to arrange alternate care for the patient;

e. There must be a causal connection between the termination of the relationship and the patient's injuries; and

f. There must be resulting damages.

2. Many Texas Courts do not regard abandonment as a separate cause of action, but as another type of medical negligence.

3. There is no cause of action for abandonment, if the patient has severed the relationship himself by going to another physician for treatment for the same conditions.

4. The patient may unilaterally terminate the physician patient relationship at any time.

E. Fraud.

1. Prior to the passage of Article 4590i (now Chapter 74 of the Texas Civil Practice and Remedies Code), plaintiff could not recover for fraud and for lack of informed consent simultaneously. Plaintiff had to proceed under one theory or the other.

2. Since informed consent now applies only to the failure to disclose risks, fraud may also be pled with lack of informed consent and constitutes a separate ground for recovery. In a commercial setting, to be guilty of fraud, a person must make (1) a representation of fact,

(2) which is false, (3) with knowledge that the representation is false, (4) with the intent that the other party rely upon the representation, (5) the other party must rely upon the representation, and (6) the other party must suffer damages due to that reliance. Fraud, in a medical context, does not include all of those elements.

a. The Courts are split on whether the doctor must know that he or she has made a misrepresentation or whether the doctor may be guilty of fraud for an unknowing misrepresentation.

b. The Courts are split on whether the doctor has to intend that the patient rely upon his or her representations.

c. A fraud claim only applies to statements of fact, not statements of opinion.

F. <u>Contract to Cure</u>**.** This must be an express warranty or promise of a particular result, it must be in writing, and it must be signed by the physician or someone acting with authority on the physician's behalf. The damages recoverable for a breach of contract to cure are not the same as the damages recoverable for medical malpractice. The damages are those for loss of the benefit of the bargain, not those recoverable for personal injury.

G. Texas Deceptive Trade Practices - Consumer Protection Act [hereafter "DTPA"].

1. In 1995, the legislature amended the DTPA to exclude claims based upon the rendition of professional services, the essence of which is professional advice, judgment, opinion, or similar professional skill. Patients may not maintain an action against a doctor, even for express misrepresentation, breach of express warranties, or fraud, under the DTPA. All personal injury and wrongful death damages

are excluded from recovery under the DTPA, unless defendant acted knowingly.

2. Under prior law, the Courts held that a patient could maintain a DPTA claim against a doctor based upon fraud, breach of express warranty of a particular result, or based upon a knowing misrepresentation.

H. Malicious Prosecution/Abuse of Process.

1. Suits for malicious prosecution and abuse of process filed by physicians against former patients and their attorneys were successful for doctors in other jurisdictions, but were unsuccessful in Texas.

2. In 1995, the legislature passed the Frivolous Pleadings and Claims Act. The act provides for a motion for sanctions for a frivolous pleading, which includes a medical malpractice petition.

3. The Frivolous Pleadings and Claims Act provides that when a lawyer or a party signs a pleading or motion, the signature is certifying that to his best knowledge, information, and belief, formed after reasonable inquiry:

    a. the pleading or motion is not being presented for any improper purpose, including to harass or cause unnecessary delay or needlessly increase in the cost of litigation;

    b. each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

    c. each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

d. each denial in the pleading or a motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

4. Any party may move for sanctions against the other party for breach of the Frivolous Pleadings and Claims Act. The prevailing party on such a motion is entitled to its attorneys fees for presenting or opposing the motion. If the Court finds that there has been a violation of the Act, then the Court may impose a sanction on the person who signed the pleading, the party represented by the person, or both. The sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include a directive to perform or refrain from performing an act, an order to pay a penalty into the Court, or an order to pay to the party seeking sanctions the amount of the reasonable expenses incurred by that party because of the filing of the frivolous pleading or motion.

I. Unauthorized Disclosure of Confidential Information.

1. The Texas Medical Practices Act prevents the unauthorized disclosure of confidential patient information to third parties. The act creates a private cause of action for the patient against the physician for such unauthorized disclosure.

2. Expert Witness Immunity. A physician is authorized to disclose confidential information in the context of a judicial proceeding and is absolutely immune from suit for so doing.

3. The Health Insurance Portability and Accountability Act ["HIPAA"] imposes additional responsibilities on health care providers to keep patient information confidential.

J. Experimental Medicine.

1. Experimental medicine is often considered a hybrid form of medical negligence in other jurisdictions, but in Texas, experimental medicine is treated under traditional medical malpractice evidentiary standards.

2. It is extremely important whenever one is engaged in clinical trials, the performance of any experimental procedure, or the administration of any experimental drug, to fully disclose to the patients all known risks involved with the procedure or drug. Often, doctors have tried to justify not disclosing all known risks to the patient on the grounds that disclosure may introduce bias into the study. For liability purposes, however, all known risks should be disclosed.

K. Unnecessary Surgery**.** The Texas Supreme Court has held that whether surgery is necessary or not is to be determined under the reasonably prudent doctor rule. In other words, the standard is still basic negligence. There is liability for damages resulting from a known risk of a surgical procedure, if the surgery should not have been performed.

L. Prenatal Injuries.

1. The Texas Supreme Court has held that if a child suffers *in utero* and is born alive, then there is recovery for the damages suffered by the child and parents. Generally, the damages are limited to the cost of the medical treatment and care that the child has sustained.

2. There is no recovery for the birth of a child who is stillborn. Nevertheless, the Texas Supreme Court has recently held that a mother may recover for her own personal injuries resulting from negligence causing a stillborn fetus. The damages include mental anguish for loss of the fetus. The father, however, does not have any recovery for loss of a stillborn child, because he was not a patient.

M. Wrongful Pregnancy or Conception.

1. There is no cause of action for a child's recovery following an unsuccessful sterilization resulting in the birth of a physically healthy child.
2. Texas does allow recovery on behalf of parents for general and special damages such as pain and suffering, loss of consortium, medical expenses, loss of wages, etc. for the birth of a healthy child that was unanticipated.
3. The parents may have a cause of action for a wrongful birth, if the child suffers from a defect, but there is no cause of action for wrongful life on behalf of the child.

N. Spoliation.

1. Spoliation refers to the destruction or alteration of evidence without permission of all interested parties.
2. Other states have created a separate cause of action or grounds for recovery based upon spoliation.
3. The Texas Supreme Court has refused to recognize an independent cause of action for spoliation of evidence, because it causes no harm, except in the context of an already existing cause of action.

4. It is generally presumed, however, if a party has destroyed or altered evidence, then the evidence would have been unfavorable to that party. The jury may be instructed regarding this presumption.
5. As a practical matter, if a litigant has ever been found to have destroyed or altered evidence, that fact, brought to the attention of the jury, will likely result not only a loss of the case, but very probably an award for punitive damages.

O. Sexual Exploitation.

1. Texas has a very comprehensive statute protecting the rights of patients who have been sexually exploited by health care providers.
2. There is a statutory cause of action for any kind of sexual conduct.
3. Sexual contact with a patient by a mental health care provider is negligence per se. Consent of the patient is not a defense.
4. Damages include recovery for mental anguish.
5. There is a three year statute of limitations in such cases, which can be tolled for up to 15 years because of the effects of the exploitation, continued dependence upon the mental health care provider, or threats, instructions, or statements by the health care provider.
6. In addition, there are common law causes of action against the therapist or physician for malpractice, breach of fiduciary duty, battery, and intentional infliction of emotional distress for sexual exploitation.

XIV. Stowers and Personal Representation.

A. Frequently, a law suit is filed in which the potential judgment against you may not be covered, in whole or in part, by your insurance policy.

1. It may be that the potential judgment exceeds policy limits.
2. It may be that there are theories of recovery asserted, such as gross negligence or intentional misconduct, which would not be covered by the policy.

B. In that case, your insurer should advise you of your right to hire independent counsel of your own choosing to advise you.

C. Why hire an independent lawyer, in addition to the lawyer your insurer has hired to defend you?

1. When the policy does not cover all of the claims or potential damages, you have a potential conflict of interest with your insurance company.
2. It may be in your interest to settle the case at a higher amount than the insurance company might desire.
3. Under the *Stowers* doctrine, the insurance company also has potential liability to you if it does not settle the case within policy limits and a judgment in excess of policy limits is rendered against you.
4. The *Stowers* doctrine is named for the *A. G. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. Comm'n. App. 1929, holding approved) case.

D. *Stowers* Doctrine

1. If the insurance company has the opportunity to settle the case within policy limits and acts unreasonably in failing to do so, it may be

liable to its insured for the amount of any judgment in excess of policy limits or not covered by the policy.

2. The elements of the *Stowers* cause of action are (1) there is actual insurance coverage for the claim, (2) the company received an offer to settle within policy limits which would have resolved all claims against you, and (3) they unreasonably failed to settle.

3. In deciding whether to settle, the insurer must act as a reasonably prudent business person would act in conducting his or her own business affairs.

4. Not every case in which plaintiffs make a policy limits demand requires that the company immediately pay policy limits.

5. The company may consider the liability potential and the amount of damages.

6. In the medical malpractice context, an insurance company's liability under *Stowers* may not exceed the liability which may be imposed on the physician. *Tex. Civ. Prac. & Rem. Code*, § 74.303(d).

7. In other words, the damage caps on medical malpractice awards apply to awards against insurance companies in a *Stowers* action.

E. Conflict of interest.

1. The attorney hired by the insurance company to represent you in the case cannot advise you on *Stowers* matters, because he or she is in a conflict of interest in doing so.

2. None of this would impair in any way the attorney's loyalty to you or his or her ability to vigorously defend the malpractice claims asserted against you.

F. Your own counsel can advise you on whether you should request that your insurer accept an offer to settle within policy limits or not.

1. Even though a settlement within policy limits may be in your immediate financial interest, you need to consider whether you are really liable.
2. If you have done nothing wrong, you may not want to request that the carrier settle at policy limits, because that may result in an increase of your insurance premiums due to the insurer paying policy limits on a defensible case.
3. Your own counsel may also advise you on other defensive actions. One of my partners advised the insurer and insurance counsel to file a motion for summary judgment. After the some resistance, the motion was filed and was granted.